Mulpha International Bhd lwn Denis Low Jau Foo & satu lagi

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MAHKAMAH TINGGI (SHAH ALAM) — GUAMAN NO MT3-22–131 TAHUN 2007
LIM CHONG FONG PK
30 DISEMBER 2014

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Tort — Penipuan — Konspirasi — Syarikat mendapati bahawa keuntungan syarikat berbeza dengan harga pembekalan dan harga pembelian — Audit dijalankan bagi menentukan kewujudan hakikat dan masalah — Kontrak-kontrak telah dimasuki untuk pembekalan kayu balak sungguhpun tiada pesanan belian yang sah — Transaksi-transaksi yang disyaki kesemuanya sebanyak 70 dan syarikat rugi sebanyak RM17,808,012.77 — Dakwaan bahawa empat orang pekerja plaintif bertanggungjawab memantau/mengendalikan transaksi-transaksi tersebut telah pun secara penipuan bersubahat untuk mencederakan plaintif bagi manfaat mereka sendiri — Sama ada pekerja-pekerja plaintif cuai dalam pelaksanaan kerja mereka

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Syarikat plaintif berperanan sebagai orang tengah antara pembeli dan pembekal kayu balak secara 'back to back'. Ini bermakna plaintif akan mengambil pesanan daripada pembeli dan kemudiannya mencari pembekal bagi pesanan tersebut dengan harga yang lebih murah. Keuntungan plaintif adalah daripada perbezaan harga pembekalan dengan harga pembelian. Apabila didapati bahawa hutang daripada jualan kayu balak syarikat plaintif terlalu tinggi, suatu audit dibuat untuk menentukan kewujudan hakikat dan masalah tersebut. Audit tersebut dibuat secara penentuan stok fizikal kayu balak dibandingkan dengan stok dalam buku-buku akaun plaintif dan juga penelitian dokumen-dokumen transaksi iaitu pesanan, kontrak pembelian dan kontrak pembekalan. Kesahihan dokumen-dokumen yang diperolehi diragui khususnya kontrak pembelian yang hanya merupakan salinan faks atau fotokopi tanpa dokumen asal. Sebahagian dokumen-dokumen juga mempunyai tandatangan yang sama. Tindakan pengesahan dengan pembeli-pembeli juga telah pun diambil. Menurut laporan audit tersebut, sepuluh pembeli tiada nombor perhubungan maka tidak dapat dihubungi, seorang pembeli mengesahkan tiada hubungan perniagaan dengan plainitf, seorang pembeli enggan mengambil serah bekalan oleh kerana ketidakpuasan mutu kayu balak yang dihantarkan, dua pembeli tidak menjawab, seorang pembeli kurang pasti sama ada pernah berniaga dengan plaintif dan dua pembeli lagi mengesahkan tidak pernah mengenali plaintif. Plaintif mengesyaki bahawa penipuan telah berlaku melalui rekaan kontrak-kontrak pesanan belian kayu balak. Kontrak-kontrak telah dimasuki untuk pembekalan kayu balak sungguhpun tiada pesanan belian yang sah. Syarikat plaintif membayar pembekal-pembekal berdasarkan kontrak-kontrak

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pembalakan kayu balak walaupun sebenarnya tiada kayu balak telah dihantarserah kepada pembeli. Transaksi-transaksi yang disyaki kesemuanya sebanyak 70. Akhirnya plaintif pada 2007 telah memfailkan tindakan ini terhadap defendan-defendan dan menuntut bahawa defendan pertama hingga keempat bertanggungjawab memantau/mengendalikan transaksi-transaksi tersebut telah pun secara penipuan bersubahat bersama defendan-defendan kelima hingga kesembilan untuk mencederakan plaintif bagi manfaat mereka sendiri. Secara alternatif, plaintif memplidkan bahawa defendan pertama hingga keempat cuai dalam pelaksanaan kerja mereka. Oleh yang demikian, plaintif telah mengalami kerugian berjumlah sebanyak RM17,808,012.77.

Diputuskan, menolak tuntutan dengan kos:

(1) Plaintif cuma dapat menggambarkan kesnya secara menyeluruh dan atas permukaan sahaja. Plaintif tidak memanggil saksi-saksi pembeli-pembeli kayu balak, pembekal-pembekal iaitu defendan kelima, ketujuh hingga kesembilan, pegawai-pegawai plaintif yang menjalankan audit pada tahun 2001–2003 dan akauntan awam plaintif untuk memberikan keterangan khusus serta mendalam untuk menerangkan setiap transaksi-transaksi yang dikatakan terbabit. Selebihnya, plaintif juga tidak memanggil saksi pakar untuk mengesahkan sama ada tandatangan di atas dokumen-dokumen yang dikatakan sama adalah dipalsukan (lihat perenggan 24).

(2) Keterangan dokumentari yang difailkan oleh plaintif juga tidak lengkap kerana sebahagian daripda dokumen-dokumen tersebut menunjukkan kewujudan stok kayu balak telah musnah dalam suatu kebakaran pada 1 Feburari 2002. Plaintif tidak dapat secara terperinci menerangkan butir-butir penipuan dari segi tarikh, tempat, pihak-pihak, cara dan persetujuan komplot bagi setiap transaksi yang terbabit. Dalam erti kata lain, plaintiff gagal mengemukakan bukti kukuh untuk menyokong kes plaintif yang dengan khususnya mengaitkan defendan-defendan antara satu sama lain seperti mana yang didakwa (lihat perenggan 24).

(3) Sebahagian dakwaan plaintif adalah remeh. Contohnya, defendan ketiga hanya telah bekerja di syarikat plaintif untuk masa lebih kurang tiga minggu sahaja semasa transaksi-transaksi penipuan berlaku mengikut dakwaan plaintif. Dalam keadaan yang sedemikian, defendan ketiga tidak boleh dipercayai telah melakukan penipuan dalam tempoh yang begitu singkat (lihat perenggan 24).

(4) Plaintif telah lama membuat laporan polis mengenai dakwaan penipuan tersebut terhadap defendan-defendan tetapi nampaknya setakat ini, tiada pendakwaan di mahkamah jenayah berlaku. Ini mungkin juga bermakna bahawa kes plaintif kekurangan merit. Plaintif gagal membuktikan bahawa defendan pertama sehingga keempat telah bersubahat ataupun berkomplot dengan defendan kelima hingga kesembilan untuk menipu

plaintif pada tahap melebihi keraguan yang munasabah. Tuntutan plaintif hanya disokong oleh dakwaan-dakwaan yang disyaki plaintif sahaja (lihat perenggan 26–27).

(5) Setelah mendengar keterangan lisan yang diberikan oleh defendan pertama hingga defendan keempat sendiri, mahkamah tiada sebab untuk meragui keterangan mereka bahawa mereka telah menjalankan kerja mengikuti prosedur sedia ada. Plaintif tidak mengemukakan keterangan prosedur yang berlainan khasnya panduan operasi dan tatatertib kerja syarikat. Panduan sedemikian kebiasaan diterbitkan dan disediakan kepada pekerja-pekerja bagi syarikat-syarikat beroganisasi besar seumpama syarikat plainitif. Plaintif juga tiada memberikan apa-apa amaran kepada defendan-defendan tersebut jika benar mereka telah salah tindak laku pada masa yang material (lihat perenggan 31).

[English summary

The plaintiff's company played the role of the middle person between the purchaser and the timber supplier by way of 'back to back'. This meant that the plaintiff would take orders from the purchaser and later find a supplier for the said order at a cheaper price. The plaintiff's profit was the price difference between the supply price and the purchase price. When it was discovered that the debt from the selling of timbre by the plaintiff's company was too high, an audit was carried out to determine the existence of such fact and problem. The audit was carried out by comparing the physical stock of the timbre to the stock in the plaintiff's account books and scrutiny of the transaction documents, namely the purchase and supply contracts. The validity of the documents acquired were doubted, namely the purchase contract which was only a copy of the facts or photocopy without the original document. Part of the documents also bore the same signature. An act of validating the purchasers was also taken. According to the auditing report, there were ten purchasers without contact numbers and therefore could not be contacted; one purchaser confirmed to not having any business relationship with the plaintiff; one purchaser refused to take the supply due to dissatisfaction over the quality of the timbre supplied; two purchasers did not answer the call; while one purchaser was not sure as to whether he had dealt with the plaintiff and two other confirmed to not knowing the plaintiff. The plaintiff suspected that fraud had taken place through fictitious contracts boasting orders of purchase of timbre. The contracts were entered for the supply of timber even though there was no valid order of purchase. The plaintiff's company paid the suppliers based on the contracts of logging of timber even though the timbers were sent to be delivered to the purchaser. The suspicious transaction rounded up to 70 in total. Finally, in 2007, the plaintiff filed the present action against the defendants and claimed that the first to the fourth defendants, who were responsible for monitoring/handling the transactions, had conspired with the fifth to ninth defendants to injure the plaintiff for the own gains. Alternatively,

the plaintiff pleaded that the first to the fourth defendants were negligent in carrying out their duties. Hence, the plaintiff suffered losses in amount of RM17,808,012.77.

Held, dismissing the claim with costs:

(1) The plaintiff only described his case as a whole and on the surface. The plaintiff did not call the witnesses, namely the timber purchasers, the suppliers namely, the fifth, seventh to ninth defendants, the plaintiff's officers who carried out the audit for the years of 2001–2003 and the plaintiff's public accountant to give specific and in depth testimony to explain every transaction that were said to have been involved. The plaintiff also failed to called the expert witness to confirm whether the signature in the documents had indeed been forged (see para 24).

(2) The documentary evidence filed by the plaintiff was also incomplete as part of the documents showed that the timber stock perished in a fire on 1 February 2002. The plaintiff could not, lay out specifically the details of the fraud in terms of time, place, parties, methods and mutual agreement to conspire for every transaction involved. In other words, the plaintiff failed to adduce solid evidence to support its case which specifically implicated each defendants as alleged (see para 24).

(3) Part of the plaintiff's allegations was frivolous. For example, the third defendant had only worked at the plaintiff's company for a period of approximately three weeks when the fraudulent transactions were said to have taken place, as alleged by the plaintiff. In such circumstances, the third defendant could not be believed to have committed fraud in such a short period of time (see para 24).

(4) The plaintiff had long made a police report on the allegations of fraud against the defendants but so far, no charge was made in the criminal court. This could mean that the plaintiff's case was devoid of merit. The plaintiff failed to prove that the first to fourth defendants had conspired or abetted with the fifth to ninth defendants to cheat the plaintiff beyond reasonable doubt. The plaintiff's claims were supported by suspicious allegations by the plaintiff only (see paras 26–27).

(5) After hearing the oral evidence by the first to sixth defendants, the court did not have any reason to doubt their evidences that they had carried out work as per the available procedure. The plaintiff did not adduce a different procedural evidence, namely the operational guideline and the working discipline of the company. Such guidelines are normally published and prepared to the employees for big organisational companies such as the plaintiff. The plaintiff also failed to give any warning to the defendants if they had indeed committed the misconduct at the material time (see para 31).]]]]]

Nota-nota

Untuk kes-kes mengenai konspirasi, lihat 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 869–870

Kes-kes yang dirujuk

CFB Aluminium Extrusion Sdn Bhd v Lim Soon Seng [2014] AMEJ 1192, MT (dirujuk)

Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmark Holdings Bhd [2006] 5 MLJ 113; [2006] 5 AMR 619, MP (dirujuk)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, MR (dirujuk)

Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, MP (dirujuk)

Undang-undang yang dirujuk

Akta Keterangan 1950 ss 101, 103

Akta Syarikat 1965 s 226(3)

Siew Chun Tut (Abdullah Ooi & Chan) bagi pihak plaintif.

Amarjeet Singh (Zubeda & Amarjeet) bagi pihak defendan pertama.

Lim Kien Huat (Lee & Lim) bagi pihak defendan kedua hingga defendan keempat.

Adrian Oswald (Noor Syuhada bt Hassim bersama dia) (Manjit Singh Sachdev, Mohammad Radzi & Partners) bagi pihak defendan keenam.

Lim Chong Fong PK:

PENDAHULUAN

[1] Kes ini merupakan suatu kes penipuan dan kecuaian yang dibawa oleh majikan terhadap pekerja-pekerjanya. Penipuan meliputi persubahatan di antara pembekal majikan dengan pekerja-pekerja tersebut.

[2] Plaintif adalah suatu syarikat perniagaan berhad yang di senaraikan dalam Bursa Saham Malaysia.

[3] Defendan pertama hingga defendan keempat merupakan bekas pekerja-pekerja plaintif.

[4] Defendan kelima hingga defendan kesembilan menjalankan perniagaan memproses dan memotong balak dan merupakan pembekal-pembekal kayu balak kepada plaintif.

A PROSES PERBICARAAN

[5] Sebelum perbicaraan kes ini bermula, plaintif telah memasukkan penghakiman ingkar terhadap defendan ketujuh dan defendan kelapan.

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[6] Perbicaraan telah dijalankan lima hari pada 16 Jun, 23 Julai dan 6, 8 dan 27 Ogos 2014.

[7] Ikatan-ikatan dokumen perbicaraan telah ditanda sebagai ikatan A-A2, B1-B7, C dan D yang meliputi keterangan dokumentari dalam ikatan B1–B7. Selebihnya, eks P1-D6 juga telah diterima-masuk sebagai keterangan.

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[8] Saksi-saksi yang berikut telah dipanggil untuk memberi keterangan lisan:

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(a) Chung Tze Hean (PW1), bekas pegawai eksekutif utama syarikat plaintif;

(b) Dennis Low Jau Foo (DW1), defendan pertama dan pengurus besar divisyen perniagaan plaintif pada 1 April 1990 hingga 24 Mac 2005;

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(c) George Tan Seng Hoe (DW2), defendan kedua dan pengurus besar divisyen perniagaan operasi antarabangsa plaintif pada 17 Disember 1990 hingga 27 Oktober 2001;

(d) Harry Ng Kim Fan (DW3), defendan ketiga dan pengurus besar divisyen perniagaan operasi antarabangsa plaintif pada 12 November 2001 hingga 27 April 2004;

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(e) Angie Ng Chow Har (DW4), defendan keempat dan pembantu pengurus divisyen perniagaan operasi antarabangsa bahagian pembalakan plaintif pada 2 Mei 1990 hingga 4 Mac 2002; dan

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(f) Low Chee Hock (DW5), pengarah syarikat defendan keenam.

[9] Selepas perbicaraan, plaintif pada 27 Ogos 2014 telah memohon untuk menarik balik tindakan ini terhadap defendan kelima dan defendan kesembilan oleh sebab defendan-defendan tersebut telah pun digulung dan plaintif tiada kebenaran mahkamah untuk meneruskan kes terhadap mereka berdasarkan s 226(3) Akta Syarikat 1965. Maka, saya telah membatalkan tindakan plaintif terhadap mereka pada 27 Ogos 2014.

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[10] Selanjutnya defendan pertama hingga keempat dan defendan keenam telah menyampaikan hujahan bertulis mereka sepertimana yang telah diarahkan. Namun, plaintif gagal berbuat demikian sungguhpun suatu perintah kecualian (unless order) telah dikeluarkan oleh saya pada 26 November 2014.

FAKTA-FAKTA LATAR BELAKANG

[11] Syarikat plaintif telah berkecimpung dalam perniagaan antarabangsa termasuk jualan kayu balak sejak tahun lapan puluhan. Peranan plaintif adalah sebagai orang tengah (*intermediary*) di antara pembeli dan pembekal kayu balak secara 'back to back'. Ini bermakna plaintif akan mengambil pesanan daripada pembeli dan kemudiannya mencari pembekal bagi pesanan tersebut dengan harga yang lebih murah. Keuntungan plaintif adalah daripada perbezaan harga pembekalan dengan harga pembelian.

[12] Pada tahun 2001, PW1 mendapati bahawa hutang daripada jualan kayu balak syarikat plaintif terlalu tinggi dan lembaga pengarah syarikat plainitf telah mengarahkan suatu audit dibuat untuk menentukan kewujudan hakikat dan masalah tersebut.

[13] Audit tersebut dibuat secara penentuan stok fizikal kayu balak dibandingkan dengan stok dalam buku-buku akaun plaintif dan juga penelitian dokumen-dokumen transaksi iaitu pesanan, kontrak pembelian dan kontrak pembekalan.

Kemudiannya suatu laporan audit pun diterbitkan. PW1 meragui kesahihan dokumen-dokumen yang diperolehi khususnya kontrak pembelian yang hanya merupakan salinan faks atau fotokopi tanpa dokumen asal. Sebahagian dokumen-dokumen juga mempunyai tandatangan yang sama.Tindakan pengesahan dengan pembeli-pembeli juga telah pun diambil. Menurut laporan audit tersebut, sepuluh pembeli tiada nombor perhubungan maka tidak dapat dihubungi, seorang pembeli mengesahkan tiada hubungan perniagaan dengan plaintif, seorang pembeli enggan mengambil serah bekalan oleh kerana ketidakpuasan mutu kayu balak yang dihantarkan, dua pembeli tidak menjawab, seorang pembeli kurang pasti sama ada pernah berniaga dengan plaintif dan dua pembeli lagi mengesahkan tidak pernah mengenali plaintif.

[14] Akibat daripada audit tersebut, plaintif pada 2003 mengesyaki bahawa penipuan telah berlaku melalui rekaan kontrak-kontrak pesanan belian kayu balak. Kontrak- kontrak telah dimasuki untuk pembekalan kayu balak sungguhpun tiada pesanan belian yang sah. Syarikat plaintif sudah membayar pembekal-pembekal berdasarkan kontrak-kontrak pembalakan kayu balak walaupun sebenarnya tiada kayu balak telah dihantarserah kepada pembeli. Transaksi-transaksi yang disyaki adalah seperti diplidkan dalam Jadual 1–5 pernyataan tuntutan plaintif. Jumlah transaksi yang terbabit kesemuanya 70 transaksi-transaksi.

[15] Akhirnya plaintif pada 2007 telah memfailkan tindakan ini terhadap defendan-defendan.

A KES PLAINTIF

[16] Walaupun, plaintif tidak membuat hujahannya selepas perbicaraan, plaintif dalam plidingnya telah menuntut bahawa defendan pertama hingga keempat yang bertanggungjawab memantau/mengendalikan transaksi-transaksi tersebut telah pun secara penipuan bersubahat bersama defendan-defendan kelima hingga kesembilan untuk mencederakan plaintif bagi manfaat mereka sendiri. Secara alternatif, defendan pertama hingga keempat cuai dalam perlaksanaan kerja mereka.

[17] Dasar kes plaintif boleh disimpulkan sebagaimana diterangkan oleh PW1 berikut:

> The plaintiff's business model was such that the first to fourth defendants with the assistance of the fifth to ninth defendants were able to intentionally replicate fake or illusory sales contracts to create market and sales, when no genuine sales were in fact secured from export customers. While no timber was processed by the fifth to ninth defendants, invoices were raised to plaintiff for payment. The first to fourth defendants certified that goods were properly received as stock and proceeded to authorise payments to be made by the plaintiff. Upon payments being made by the plaintiff, an 'open position' of stock holdings was created in the plaintiff's books that were in fact not supported by the physical stock purportedly held by the fifth to ninth defendants. The process was repeated with different illusory of fake sales contracts (from customers who had previous dealings with the plaintiff) and purchase contracts, with each of the fifth to ninth defendants. The existence of the 'open position' of stock holdings in the plaintiff's books has accumulated to an excess of RM 58,000,000 in 2001.
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> In order to cover up an open stock position, portions of the open stock position was said to have been purportedly delivered to customers and this was subsequently recorded as account receivables. This was the method applied by the first to fourth defendants in order to reduce the open position of stock. In reality, there were no actual physical stock movements or shipments. The accounts receivables were eventually squared off with further payments by the plaintiff by creating further new and illusory sales contracts. These payments were channeled to the fifth to ninth defendants respectively via a 'teeming and lading' process. However the initial 'open position' stock holdings had become so significant that bigger and more frequent new illusory sales contract had to be created, leading to the inflation of both the 'open position' stock and the account receivables.
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> While it is customary for export trades to use letter of credits to secure payments and they are often quoted in foreign currencies as means of settlement, the fifth to ninth defendants made TT or cheque payments to 'teem and lade'. The first to fourth defendants would advise the plaintiff's accounts department of any settlements whenever payments were purported remitted. The first to fourth defendants took advantage of the plaintiff's accounts department lack of vigilance in not questioning why such settlements were not made in foreign currencies as they were under the original contracts or needed processing of documents associated with export of

documentary credits ie shipping documents, negotiating bank settlements and so forth.

The physical stock take conducted by the plaintiff in February 2003 confirmed the absence of such 'open position' stock, prompting the plaintiff having to make provisions/write offs that resulted in losses to the plaintiff.

The 'teeming and lading' process is such that the deficiencies in/loss of cash or assets in a company can be concealed by using cash or assets from new transactions to cover the deficiencies of older cash/asset balance, that in reality has been depleted, lost or misappropriated. Essentially, this system can be defined as a 'new for old' system. 'Teem and lade' therefore creates the impression that the depleted, lost or misappropriated cash or assets has been recovered to detract the management from knowing that a loss has in fact occurred. However if the depleted, lost or misappropriated cash or assets are too large to cover up, a physical verification will discover any shortfall unless the perpetrators are able to replace what has been taken out.

[18] Oleh yang demikian, plaintif telah mengalami kerugian berjumlah sebanyak RM17,808,012.77 dan ingin menuntut kerugian ini daripada defendan-defendan masing-masing mengikut kadar seperti berikut:

a)	defendan pertama	- RM 17,808,012.77
b)	defendan kedua	- RM 14,370,271.74
c)	defendan ketiga	- RM 1,372,611.51
d)	defendan keempat	- RM 17,808,012.77
e)	defendan keenam	- RM 2,016,303.36

KES DEFENDAN-DEFENDAN

[19] Defendan pertama hingga keempat dan defendan keenam pada amnya menafikan tuntutan plaintif dan memerlukan plaintif membuktikan dakwaannya.

[20] Defendan pertama sehingga keempat juga menyatakan bahawa pada segala masa material mereka telah melaksanakan kerja dengan jujur mengikut amalan dan atau tata kerja syarikat plaintif.

[21] Selebihnya, defendan keenam menyatakan bahawa kesemua pesanan plaintif untuk kayu balak dalam kontrak MIB/PSB/0691/2000, MIB/TOM/0569/2000, MIB/TOM/0668/2000, MIB/TOM/0721/2000, MIB/TOM/0520/2000, MIB/TOM/0637/2000, MIB/TOM/0615/2000, MIB/TOM/0597/2000, MIB/TOM/0565/2000, MIB/TOM/0596/2000, MIB/TOM/0634/2000 dan MIB/TOM/ 0541/2000 telah pun dihantar-serah kepada plaintif di tempat pengambilan yang biasa tanpa apa-apa bantahan oleh plaintif pada masa yang material.

A PENEMUAN MAHKAMAH

[22] Beban untuk menemui tuntutan dalam tindakan ini jelas adalah ditanggung oleh plaintif; lihat 101–103 Akta Keterangan 1950.

B *Penipuan*

[23] Bagi allegasi penipuan secara bersubahat, plaintif dikehendaki membuktikannya melebihi apa-apa keraguan yang munasabah. Dalam kes *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393, Low Hop Bing HMR berkata di ms 399:

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> The tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means: see *Davies v Thomas* [1920] 2 CH 189 per Warrington LJ, and *Seah Siang Mong v Ong Ban Chai & Another Case* [1996] MLJU 484; [1998] 1 CLJ Supp 295 (HC) per Ghazali J (now FCJ). There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:
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> (a) an agreement between two or more persons;
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> (b) for the purpose of injuring the plaintiff; and
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> (c) Acts done in the execution of that agreement resulted in damage to the plaintiff: *Marrinan v Vibart* [1962] 1 All ER 869 at p 871 per Salmon J; and Halsbury's Laws of England (4th Ed) Vol 45 at p 271, as applied by Ghazali J (now FCJ) in S*eah Siang Mong*.
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> *As the tort of conspiracy to defraud involves an element of fraud, the standard of proof required is very high. It is proof beyond reasonable doubt.* In *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 at pp 233a-g, 234a-h and 235a-d, Steve Shim CJ (Sabah and Sarawak) (as he then was) applied the Privy Council advice given by Lord Diplock in *Saminathan v Pappa* [1981] 1 MLJ 121 and held that the standard of proof for fraud in civil proceedings is proof beyond reasonable doubt. This high standard of proof was reaffirmed by the Federal Court in *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1 where Nik Hashim FCJ (as he then was) said at p 19 para [12] that 'It is now settled law that the standard of proof required where there is allegation of fraud in civil proceedings must be one beyond reasonable doubt and not on a balance of probabilities'.
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[24] Saya telah menelitikan keterangan lisan yang dikemukakan oleh PW1, saksi tunggal plaintif dan juga keterangan dokumentari yang difailkan. Pada pendapat saya, plaintif cuma dapat menggambarkan kesnya secara menyeluruh dan *superficial* atas permukaan sahaja. PW1 tiada pengetahuan terperinci dan plaintif tidak memanggil saksi-saksi pembeli-pembeli kayu balak, pembekal-pembekal iaitu defendan kelima, ketujuh hingga kesembilan,

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pegawai-pegawai plaintif yang menjalankan audit pada tahun 2001–2003 dan akauntan awam plaintif untuk memberikan keterangan khusus serta mendalam untuk menerangkan setiap transaksi-transaksi yang dikatakan terbabit. Selebihnya plaintif juga tidak memanggil saksi pakar untuk mengesahkan sama ada tandatangan di atas dokumen-dokumen yang dikatakan sama adalah dipalsukan; lihat *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19. Keterangan dokumentari yang difailkan oleh plaintif adalah juga tidak lengkap kerana sebahagian daripada dokumen-dokumen tersebut yang menunjukkan kewujudan stok kayu balak telah musnah dalam suatu perbakaran pada 1 Februari 2002. Oleh yang sedemikian, plaintif tidak dapat secara terperinci menerangkan butir-butir penipuan dari segi tarikh, tempat, pihak-pihak, cara dan persetujuan komplot bagi setiap transaksi yang terbabit. Dalam erti kata lain, plaintiff telah gagal mengemukakan bukti kukuh (hard evidence) untuk menyokong kes plaintif yang dengan khususnya mengaitkan defendan-defendan diantara satu sama lain sepertimana yang didakwa. Saya juga memerhatikan bahawa sebahagian allegasi plaintif adalah remeh. Contohnya, defendan ketiga hanya telah bekerja di syarikat plaintif untuk masa lebih kurang tiga minggu sahaja semasa transaksi-transaksi penipuan berlaku mengikut allegasi plaintif. Dalam keadaan yang sedemikian, saya tidak mempercayai bahawa defendan ketiga telah melakukan penipuan dalam tempoh yang begitu singkat.

[25] Tambahan pula, defendan-defendan juga menunjukkan bahawa keterangan plaintif adalah bercanggah. Misalnya, tandatangan yang dikatakan sama ternyata di nota hantar-serah tetapi fakta ini tidak konsisten dengan dakwaan tiada penghantar-serahan kayu balak. Dari segi akaun beraudit plaintif, jelas plaintif juga tidak membuat peruntukan bagi kerugian yang dikatakan telah pun dialami oleh plaintif. Peruntukan seumpama ini mesti dilaporkan secara lazimnya.

[26] Plaintif telah lama membuat laporan polis mengenai dakwaan penipuan tersebut terhadap defendan-defendan tetapi nampaknya setakat ini, tiada pendakwaan di mahkamah jenayah berlaku. Ini mungkin juga bermakna bahawa kes plaintif kekurangan merit.

[27] Maka dan sungguhpun plaintif telah mengalami kerugian dalam perniagaan kayu balaknya, saya berpendapat bahawa plaintif telah gagal membuktikan bahawa defendan pertama sehingga keempat telah bersubahat ataupun berkomplot dengan defendan kelima hingga kesembilan untuk menipu plaintif pada tahap melebihi keraguan yang munasabah. Tuntutan plaintif hanya disokong oleh dakwaan-dakwaan yang disyaki plaintif sahaja.

[28] Daripada keterangan yang telah dikemukakan, saya juga puas bahawa defendan keenam telah menghantar kayu balak berikutan pesanan plaintif

dalam kontrak-kontrak pembekalan. Dokumen-dokumen sokongan yang berkenaan memang lengkap; lihat *CFB Aluminium Extrusion Sdn Bhd v Lim Soon Seng* [2014] AMEJ 1192. Oleh yang demikian, saya berpendapat bahawa kesemua pesanan dan pembekalan adalah jujur dan benar dan defendan keenam wajib dan telahpun sempurna dibayar oleh plaintif.

KECUAIAN

[29] Dakwaan alternatif plaintif terhadap defendan pertama hingga defendan keempat adalah kecuaian dalam perlaksanaan kerja. Menurut plaintif, defendan-defendan berkenaan harus sedar tetapi gagal dan/atau abai untuk mengesahkan dengan betul kebenaran, ketepatan dan kesahan kontrak-kontrak jualan, memastikan penghantaran kayu balak oleh pembekal, memeriksa dan meluluskan invois-invois pembekal dan memastikan penghantaran kayu balak kepada pembeli.

[30] Tugas dan kewajipan seorang pekerja terhadap majikan telah pun diterangkan dalam kes mahkamah persekutuan *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmark Holdings Bhd* [2006] 5 MLJ 113; ; [2006] 5 AMR 619. Dalam kes itu, Siti Norma Yaakob FCJ berkata di ms 123–124 (MLJ), 629–631(AMR):

> In Malaysia, the general rule governing the doctrine of superior orders is nothing more than the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders. The classic modern statement of that duty is found in the judgment of Lord Eversherd MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 to be as follows:
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> It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service namely the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally. *Working as instructed is the employee's basic consideration under a contract of employment just as providing remuneration is the basic consideration of his employer. However the employee's duty to comply is confined to all the lawful and reasonable orders of his employer in respect of the performance of such functions that falls within the scope of his contract of employment. Whether the employer's orders are lawful and reasonable would depend very much on the terms and conditions of the contract and the character of employment. The term 'lawful and reasonable order' is often used to describe the order given and in this context it means primarily an order which is reasonably within the ambit of the employment in question so that, in any given dispute much or all will depend on the terms of the individual contract of employment. The employer thus cannot give an order outside the proper scope of the employment.*
>
> One of the earliest cases dealing with the question of lawful and reasonable orders can be found in *Menon v The Brooklands (Selangor) Rubber Co Ltd* [1968] 1 MLJ 15

where Raja Azlan J (as he then was) had to deal with the issue of the plaintiff's refusal to acknowledge receipt of a warning letter on a copy. The refusal was reported to the manager, who then directed the assistant manager to write to the plaintiff a letter instructing him to see the manager personally. This was done but the plaintiff refused to comply with such direction. The plaintiff was found guilty of misconduct in his employment in that he disobeyed the lawful and reasonable order of the defendants. The footnote on the case had the following holding:

> Held: the refusal to acknowledge receipt of warning letter justified instant dismissal since it goes to the essential conditions of his contract of service which requires that he be a diligent and responsible estate conductor. The conduct was inconsistent with his duty towards the master. It was inconsistent with the continued confidence between them essential to the relationship of master and servant.

Further on appeal to the *Federal Court* [1968] 2 MLJ 186. Pike CJ, in dismissing the appeal had this to say:

> This, in addition to the contumacious manner in which he refused to obey instruction to see the manager of the estate, went far beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabrics of the relationship of employer and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position.

That same principle of law was followed in *Oasis Milk Bar v Lim Teng & Ors* [1962] 1 MLJ 306; [1962] 1 LNS 111; *Vasudevan Filial & Anor v City Council of Singapore* [1965] 2 MLJ 51; *Yong Yoke Sung & Ors v Sungai Way Estate* [1966] 1 MLJ 175 and *C Paranthaman v Sime Darby Bhd (Sime Darby Plantation)* [1994] MLJU 523; [1994] 4 CLJ 532.

From the case law, it is clear that the duty of obedience is confined to compliance with the lawful and reasonable orders of an employer and as such the concept of an order being manifestly wrong has no part in the doctrine of superior orders. To that extent the Court of Appeal erred when it made an exception to the general rule on superior orders when stating that an employee is entitled to disobey the orders of his superior if he, the employee is aware that that such orders are manifestly wrong. However that exception holds good in military or criminal law as seen from the case of *PP v Tengku Mahmood Iskandar* [1973] 1 MLJ 128 where it was held that 'a soldier is not protected where the order is grossly illegal'.

The duty of an employee at common law is also similar in that he is to comply with all lawful and reasonable orders given by his employer with respect to the performance of such functions within the scope of his employment. That duty is one of the fundamental obligations which deemed to be impliedly undertaken in every contract of hiring.

The duty of obedience at common law is subject to two qualifications, firstly that the employer may not order his employee to do something illegal or secondly order his employee to do anything dangerous.

However it may well be that an employee is caught in the situation that he is

A required to obey an order and he is doubtful whether the order is legal or not. Under those circumstances the proper course is for the employee to obey the order first and to challenge its legality in separate proceedings. This distinction is made on the basis that if the law allows the employee to disobey any order he thinks is not legal, it would be impossible for the management to maintain discipline and industrial peace. On the other hand, if the employee takes upon himself to disobey the order which he thinks to be unlawful and unreasonable two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried out, he can do the work and take the matter further in proceedings against his employer or to complain to his union. If he disobeys, he must take the risk if the court finds the order to be lawful and reasonable. See the case of *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27; [2002] 1 AMR 469.

[31] Dalam kes ini, saya telah mendengar keterangan lisan yang diberikan oleh defendan pertama hingga defendan keempat sendiri. Saya tiada sebab untuk meragui keterangan mereka bahawa mereka telah menjalankan kerja mengikuti prosedur sedia ada. Plaintif tidak mengemukakan keterangan prosedur yang berlainan khasnya panduan operasi dan tatatertib kerja syarikat. Panduan sedemikian kebiasaan diterbitkan dan disediakan kepada pekerja-pekerja bagi syarikat-syarikat beroganisasi besar seumpama syarikat plaintif juga tiada memberikan apa-apa amaran kepada defendan-defendan tersebut jika benarnya mereka telah salah tindak laku pada masa yang material. Sebenarnya, defendan-defendan tersebut telah pun membantu plaintif semasa pemeriksaan audit dijalankan.

[32] Saya mengulangi penemuan saya dalam perenggan 24 dan 25 di atas. Bukti keabaian yang dikemukakan oleh plaintif memang tidak memadai. Maka, saya berpendapat bahawa plaintif juga gagal membuktikan bahawa defendan pertama hingga keempat telah melakukan kecuaian semasa berkerja.

KESIMPULAN

[33] Berdasarkan alasan-alasan di atas, saya menolak tuntutan plaintif dengan kos RM25,000 kepada defendan pertama, RM10,000 kepada defendan kedua, RM5,000 kepada defendan ketiga, RM25,000 kepada defendan keempat dan RM20,000 kepada defendan keenam.

Tuntutan ditolak dengan kos

Dilaporkan oleh Afiq Mohamad Noor